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Supreme Court of the United States

October Term, 1920—No. 491.

THE WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

against

ESTEVE BROS. & COMPANY,

Respondents.

BRIEF FOR PETITIONER.

General Statement.

This case comes here on a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

The vital question involved is this: Are the stipulations limiting liability for interstate and foreign telegrams, which have been duly established by telegraph companies in pursuance of the permission granted by the act to regulate commerce, and filed with and approved by the Interstate Commerce Commission, applicable to all telegrams alike, or only to such telegrams as are written on the ordinary message blanks in which these conditions are set forth? In other words, does the sender of the message who writes it on a plain paper or telephones it to the telegraph office secure a higher measure of liability, in exchange for the same rate, than his competitor who writes a similar message on the usual sending blank?

The material facts, as shown by the agreed statement (R. pp. 17 and 20), are as follows:

On September 13, 1917, the respondents deposited in the central office of the Spanish government telegraph administration at Barcelona, Spain, for transmission to New Orleans, La., a message reading as follows:

> "Esteve Bros., New Orleans. Sell two hundred bales futures naming equivalent New Orleans October price (signed) Esteve."

The message was correctly transmitted by the central office of the telegraph administration at Barcelona, Spain, to Paris, France, and was correctly transmitted by the system of telegraphs owned and operated by the French government from Paris, France to Havre, France, and was there delivered to the petitioner's cable system, over which it was transmitted correctly to New York City, where it was turned over to the petitioner's land line system for transmission between New York City and New Orleans. On the petitioner's land line system between New York City and New Orleans the third word, namely the word "*hundred*" in the text of the message, was changed to read "*thousand.*"

On May 2, 1916, the executive committee of the petitioner, by formal act, had adopted and approved the classification of messages and the forms and the rules and regulations respecting the transmission of messages and the conditions and stipulations shown on its message forms, and had authorized the petitioner's president to file them with the Interstate Commerce Commission (R. p. 20). In May, 1916, the petitioner, acting under the authority of the resolution just referred

to, filed with the Interstate Commerce Commission its classification of land line and cable messages and filing forms, together with the conditions under which the various classes of land line and cable messages are handled, and its tariffs and schedules; and all of these are now on file with the Interstate Commerce Commission and have been on file with them continuously since May, 1916 (R. p. 18). There is no rule or regulation of the Interstate Commerce Commission requiring the filing of any tariffs, schedules, blanks or forms of telegraph or cable companies. None of the petitioner's forms or blanks which had thus been filed with the Commission were used at any time in the receiving or transmission of the message on which this suit is based. The respondents have their main office in Barcelona and had no actual information as to the resolution of the petitioner's executive committee before referred to [illegible] the filing of any forms, blanks, tariffs or schedules with the Interstate Commerce Commission.

Prior to June 18, 1910, and up to and including the month of September, 1917, the rate charged for an unrepeated message between Barcelona, Spain, and New Orleans, La., was forty-four cents per word for defendant's land-line system between New York City and New Orleans, twenty-five cents per word for its cable system between New York City and Havre, France, and thirteen cents per word over the French and Spanish government telegraph systems (R. p. 19). This rate is not a joint rate, but is the sum of the local rates of each of the connecting systems over which the message involved passed. All cablegrams turned over to the petitioner's land-line system by its cable system are handled as land-

line messages, except that the charge therefor is based on the number of words in the message, including the address and signature, whereas in the case of an ordinary land-line message the charge is based solely on the number of words in the body of the message, the address and signature being transmitted free. The amount paid by the respondent to the Spanish telegraph administration at Barcelona for the transmission of the message from Barcelona to New Orleans in the manner heretofore described was $6.60, of which the petitioner subsequently received $1.65, $3.75 of which was apportioned in accordance with the tariff to the transmission from Havre to New York City, and ninety cents to the transmission from New York City to New Orleans. The amount so received is the amount specified in petitioner's tariffs on file with the Interstate Commerce Commission, and is the amount specified in these tariffs for the transmission, without repetition, of a message containing the number of words contained in this message, including its delivery at New Orleans. The respondents made no request to have the message in question repeated. Had they requested the repetition of the said message, they would have been required to pay a higher rate (R. p. 19).

Immediately on receipt of the message at New Orleans, the respondent's office there sold two thousand January cotton at $19.57 per pound, and on September 15, 1917, immediately advised their Barcelona office that they had done so. Thereafter, and without delay, the respondents' Barcelona office advised the New Orleans office by cable that the order was for *two hundred* instead of *two thousand*, and on receipt of this in-

formation the respondents re-purchased eighteen hundred January cotton at $23.01 per pound, as compared with the selling price of $19.57 per pound, resulting in a loss of $30,960, together with commissions of $135.00, making a total of $31,095.00, which amount was actually paid out in cash and lost by the plaintiff as a result of the error in the transmission of the cable involved (R. p. 20).

The case was tried before a jury on an agreed statement of facts. The motion of the respondents for the direction of a verdict for the full amount of the loss shown by the said statement of facts, namely, the sum of $31,095.00, was granted by the court (p. 27), and the motion of petitioner to direct a verdict for $4.65, its proportion of the amount received for the transmission of the message, with interest, was denied. The motion was based on the following ground:

> "That to hold defendant liable in this case beyond the amount of the liability provided for in its established classifications and tariffs, filed with the Interstate Commerce Commission, to wit, the amount of the proportion of the tolls accruing to the defendant, or the sum of $4.65, with interest from the date of the message, would be in contravention of Article 1, Section 8, sub-division 3 of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several states and with foreign nations and of the Act of Congress approved June 18, 1910" (R. p. 16).

Judgment was entered in favor of the respondents and against the petitioner for the sum of $31,095.00 with legal interest from February 16, 1918, together with all costs of the suit (R. p 28).

The Circuit Court of Appeals affirmed the judgment of the trial court (R. p. 37).

The petitioner's contention, which was rejected by the trial court and the Circuit Court of Appeals, is that as the message was unrepeated and paid for as such, regardless whether it was or was not written on one of the petitioner's blanks, the recovery should be limited to the amount accruing to petitioner for the transmission of the message, because the duly established regulations of the defendant in effect at the time the message was filed, and the tariffs, rules, regulations and message forms on file with the Interstate Commerce Commission and approved by that body, provided that in the case of an unrepeated message the liability should be limited to the portion of the tolls received by the petitioner. This question was raised by the pleadings filed in the trial court (R. p. 12), by the petitioner's request for a directed verdict (R. p. 16) and by the assignment of errors (R., pp. 30 and 31).

As stated in the opening paragraph, this case presents the question whether the stipulations limiting liability for interstate and foreign telegrams are applicable to all telegrams or only to such telegrams as are physically written on an ordinary message blank on which the stipulations with respect to liability are set forth.

ARGUMENT.

POINT I.

The fundamental purpose of the commerce act would be defeated if the sender could secure a higher measure of liability, for the same rate, by writing his message on plain paper instead of the usual message blank.

The transmission of telegraph messages from one State or Territory to or through another State or Territory is interstate commerce.

Western Union Tel. Co. v. Texas, 105 U. S. 460; 26 L. Ed. 1067;
Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., 251 U. S. 27;
Western Union Tel. Co. v. Boegli, 251 U. S. 315;
Western Union Tel. Co. v. Speight, 41 Sup. Ct. Rep. 11,—U. S.—(not yet officially reported);
Postal Tel-Cable Co. v. Dickerson, 41 Sup. Ct. Rep. 60,—U. S.—(not yet officially reported).

In *Western Union Tel. Co. v. Crovo*, 220 U. S. 364, this court said:

> "That companies engaged in the telegraph business, whose lines extend from one state to another, are engaged in interstate commerce, and that messages passing from one state to another constitute such commerce, is indisputable."

By a long line of decisions of this court the principle is recognized that, in the absence of

congressional legislation on the subject of interstate communication by telegraph, the States are at liberty to apply their own decisions and declarations of policy.

Western Union Tel. Co. v. James, 162 U. S. 650;
Western Union Tel. Co. v. Crovo, 220 U. S. 364;
Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406.

The Act of Congress of 1910.

All the decisions prior to this act rested on the fundamental fact that Congress had not legislated on the subject, and that the State statutes were valid only in the absence of such legislation and until such legislation took place. Since the decisions of this court in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., supra*, and *Western Union Tel. Co. v. Boegli, supra*, it is no longer open to question that the Act of 1910 is such legislation.

The commerce act as amended by the Act of June 18, 1910 (Ch. 309, 36 Stat. L. 544, 8 Compiled Stats., 1916, p. 9053), so far as it is material here, at the time the message in this case was sent, read as follows (the portion in italics and doric type showing the amendments of June 18, 1910, so far as they relate to the question involved in this case):

> "Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means

of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States to any other State, Territory, or District of the United States,* **or to any foreign country,** who shall be considered and held to be common carriers within the meaning and purpose of this act, * * * provided, however, That the provisions of this Act *shall not * * * apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted* **to or from a foreign country** *from or to any State or Territory as aforesaid*" * * *.

Paragraph (3), Section 1, declared:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone, or cable,* as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; *Provided, That messages by telegraph, telephone or cable, subject to the provisions of this Act, may be classified into day, night,* **repeated, unrepeated,** *letter, commercial, press, Government and such other classes as are just and reasonable,* **and different rates may be charged for the different classes of messages;** *And provided further That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.*"

And Section 3 read:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable

preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," etc., 24 Stats. at L. 380, 8 U. S., Compiled Stats. page 9094, Sec. 8565.

Section 10 declared that:

"Any common carrier subject to the provisions of this Act * * * who * * * shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, * * * or shall wilfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this Act to be done not to be so done, * * * or shall be guilty of any infraction of this Act for which no penalty is otherwise provided * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdicton of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense;" etc. U. S. Compiled Stats. page 9174, Sec. 8574.

Sec. 15. (As amended June 29, 1906, June 18, 1910, and February 28, 1920.) (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any

individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

The question whether Congress, by its action in the passing of this amendatory Act of June

18, 1910, has taken possession and assumed control of the field of interstate and foreign commerce by telegraph, was determined definitely and finally by this court in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., supra*, when this court said:

> "In the first place, as it is apparent on the face of the Act of 1910, that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting laws.
>
> "In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose case, the right to contract on such subject was embraced within the grant of the primary rate-making power.
>
> "In the third place, as the act expressly provided that the telegraph, telephone or cable messages to which it related may be "classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and

reasonable and different rates may be charged for the different classes of messages," it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission (*Clay County Produce Co. v. Western Union Telegraph Co.*, 44 I. C. C., 670.) from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

"But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (*Gardner v. Western Union Tel. Co.*, 231 Fed. Rep., 405); and by the numerous and conclusive opinions of state courts of last resort which in considering the Act of 1910, from various points of view, reached the conclusion that that Act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefore was an occupation of the field by Congress which excluded state action, etc."

The Circuit Court of Appeals for the eighth circuit in *Gardner v. Western Union Tel. Co.*, 231 Fed. 405, at p. 409 (certiorari denied 243

U. S., 644), which was cited with approval in the Warren-Godwin case, said:

> "It appears beyond question therefrom that, in so far as the provisions of the act to regulate commerce are applicable, it applies to all interstate telegraph business, that as to all interstate business, telegraph, telephone, and cable companies are common carriers within the meaning and purposes of the act; that as to their interstate business telegraph companies must print and publish their rates, rules, classifications, regulations, and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeated, and such other classes as are just and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations; that the Interstate Commerce Commission shall determine what is a just and reasonable regulation or practice; that the rules and regulations established by telegraph companies or other common carriers are deemed reasonable and just until changed by the Interstate Commerce Commission. It results necessarily from the foregoing conclusions that Congress has not only taken possession of the field of interstate commerce by telegraph, but has also specifically prescribed the rules which shall govern the transaction of such commerce."

Uniformity of obligation, service and LIABILITY the manifest purpose of the Act.

In view of the language of the Act of 1910, and of its interpretation by this court and by the Circuit Court of Appeals for the eighth circuit and by the Interstate Commerce Commission in *Clay County Produce Co. v. Western Union Tel. Co.*, 44 I. C. C. 670, which was also cited with approval by this court in Warren-Godwin Lumber Company case, it is clear that the principles enunciated in the many decisions of this court as to the effect of the provisions in the tariffs of common carriers by railroad are applicable equally to telegraph and cable companies. Those decisions conclusively establish: first, that the public are bound by the tariffs on file with the Interstate Commerce Commission, regardless of knowledge, assent or even misrepresentation (*Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98; *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242; *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S. 94, and cases cited therein). Secondly, that a limitation of liability contained in or filed with the tariffs is an essential part of the rate, and that a shipper or passenger is bound thereby, even though he has no knowledge thereof and has not assented thereto (*Boston & Maine Railroad v. Hooker*, 233 U. S. 97, and cases cited therein).

The facts in the Hooker case were substantially similar to those in the case at bar. In that case the plaintiff had checked her baggage on a first class railroad ticket. No inquiry was made of her as to the value of the baggage, nor did she

expressly assent to any limitation of liability, or have any actual knowledge of any tariff provisions on the subject. However, the tariffs on file with the Interstate Commerce Commission, which were the duly established and legal tariffs, contained a provision limiting baggage liability to one hundred dollars in the absence of a greater declared value. On these facts the court held that the recovery for the loss of the baggage due to the negligence of the carrier was limited to one hundred dollars. The court said (p. 110):

> "The cases in 226 and 227 U. S., it is true, involved liability for express or freight shipments made upon express receipts, bills of lading or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the court did not stop there: In *Adams Express Co. v. Croninger*, *supra*, page 509, it said: 'The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission.' In *Kansas City Southern Ry. Co. v. Carl*, *supra*, page 652, this court said: 'The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate when made out and filed, is notice, and the effect is not lost, although it is not actually posted in the station. *Texas & Pacific Railway v. Mugg*, 202 U. S., 242; *Chicago & Alton Ry. v. Kirby*, 225 U. S., 155. It would open a wide door to fraud

and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay * * * (p. 654). To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate.' And in *Missouri, K. & T. R. Co. v. Harriman, supra*, this court said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules, (p. 669), 'not only because referred to in the contract signed by them, but because they have been lawfully filed and published * * *' (p. 671). When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate.' In *Chicago, R. I. & P. Ry. Co. v. Cramer*, 232 U. S., 490, this court said page 493: 'That rule of liability (the uniform rule established by the Hepburn Act) is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property.'"

We believe that the Hooker decision is determinative of the question here presented. It was a recognition of the necessity of making effec-

tive the purpose of the Interstate Commerce Act "to have but one rate open to all alike and from which there could be no departure" (*Boston & Maine R. R. v. Hooker, supra*, p. 112). This decision and others like it were based on broad grounds of public policy and without regard to the equity of the claim of the particular litigant. The same reasons of public policy necessitate the enforcement of the tariff limitation in the case at bar.

In *Clay County Produce Co. v. Western Union Tel. Co., supra*, the Interstate Commerce Commission said:

> "Having been declared to be common carriers, and having been subjected to the general provisions of the Act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of one person either less or more than they demand of another person for the same service. To secure such uniformity in their dealing with the public was doubtless one of the purposes of Congress in subjecting telephone and telegraph companies to the provisions of the Act to regulate commerce, and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. **It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies unless rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference.**
>
> "**Almost from the beginning of telegraphy in this country, the basic rate has been that charged for the transmission of an unrepeated message, the rates for repeated and special value messages being built upon it. The unrepeated rate of charge has always**

been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission, or delays in the delivery beyond the sum received for sending the message."

More than a quarter of a century ago this court recognized the validity of the unrepeated message stipulation (*Primrose v. Western Union*, 154 U. S. 1); and in 1910 Congress placed its seal of approval on that decision by providing that messages might be classified into "repeated, unrepeated, * * * and such *other* classes as are just and reasonable, and different rates may be charged for the different classes of messages." Congress did nothing if it did not recognize that the limitation of liability was an integral part of the rate when it provided that "different rates may be charged for the different classes of messages."

It is evident, therefore, that the limitation of liability to the price paid for sending the message is the prime factor in fixing rates for unrepeated messages. Uniformity in rates can only be maintained by enforcing this stipulation in every case where the class of service chosen is an unrepeated message and the rate charged and paid is based on that classification. To make the enforcement of this condition depend entirely on whether the message was written on a blank form in which this condition is set forth would open the door wide to fraud and discrimination, would violate the fundamental principle that all persons must be charged the same rate for the same service, and would in effect nullify the command of uniformity which is the basic and dominant motive of the Act.

In the courts below counsel for the respondent asserted that the Hooker and similar decisions before referred to were not applicable because the petitioner was not *by law obliged* to file any tariffs with the Interstate Commerce Commission. We submit that this is a distinction without a difference. Whether the petitioner is or is not required to file its tariffs, it is a fact that it had filed them long prior to the sending of the message sued on. The rates and the conditions which were a part of the rates became binding on the public and the company alike *on their adoption by the company* in conformity with the authority vested in it by the Act, and could not be departed from until changed either by the fixing of new rates or by the order of the Commission. Up to the date of the message sued on the Commission had not seen fit to disturb the unrepeated message regulation, but four months before the sending of this message it had held that it had jurisdiction to consider the reasonableness of that regulation, and had held it valid (*Clay County Produce Company v. Western Union Tel. Co., supra*). In its opinion in that case the Commission said (p. 674):

> "Under the act, as has many times been said, *the right to initiate their rates rests with the carriers. As section 6 does not apply to telephone and telegraph companies, it may well be said that in a special sense and to a special extent such companies do initiate their charges.* But it has not been thought or even suggested that a telephone or telegraph company, after having fixed and established a charge for a particular service, or a regulation pertaining to or affecting the rate or service, may depart from the

charge, or from the regulation affecting the charge, at its discretion or until the charge or regulation has been lawfully changed by it. The courts have often said that the vital feature of the act to regulate commerce is to secure equality and uniformity as to all persons availing themselves of the services of common carriers and to destroy any favoritism by such carriers among those requiring their services. This principle, founded in common right as well as in common justice, runs all through the act and through the supplementary legislation enacted in aid of the enforcement of the act. **It can not therefore be doubted, and indeed the complainants here do not contend to the contrary, that even though section 6 is inapplicable to telephone and telegraph companies, their rates and charges are nevertheless binding upon such companies, when they have lawfully been fixed and offered to the public; and the rates and charges must be observed, together with the rules and practices affecting the rates and charges, until they have lawfully been changed, either voluntarily or under the orders of this Commission. Having been declared to be common carriers, and having been subjected to the general provisions of the act, it is manifest that telephone and telegraph companies may not lawfully accept or exact of one person either less or more than they demand of another person for the same service.** To secure such uniformity in their dealing with the public was doubtless one of the purposes of the Congress in subjecting telephone and telegraph companies to the provisions of the act to regulate commerce; and we think the language used by the Congress in doing this was sufficient to accomplish the end sought. It is scarcely necessary to add that there can be no uniformity in the application of the rates and charges of such companies unless

> rules and regulations like those here under consideration, that directly affect the rates, are also enforced without discrimination or preference."

The Interstate Commerce Act outlined certain steps that must be taken by the various carriers before a rate becomes legal. In the case of carriers of persons and property one of the steps necessary to the establishment of a legal rate of regulation is the filing of the rate or regulation with the Interstate Commerce Commission, and no rate or regulation can become legal or effective until it is filed, simply because the law says it must be filed before it is legal and effective. In the case of the other carriers subject to the same act, namely, telegraph and cable companies, the act does not require the filing of the rate or the regulation, and in the absence of this requirement the regulation is legal and binding the moment it is fixed and established by the carrier. As pointed out in the *Cultra* opinion, the carrier initiates the rate and the regulation, and once so initiated it is and remains the legal rate or regulation until it is changed by the act of the carrier itself or by the Commission. While the method of establishing a legal telegraph or cable rate under the Act of Congress in question differs from that imposed upon carriers of persons and property, the object in the case of all carriers is the same, namely, the attainment of equality of rate, regulation and service, and the prevention of discrimination.

It is not the physical act of filing of the rate, as such, in the case of carriers of persons and property that creates constructive notice of the regulations under which these carriers are doing

business, but it is the establishment of a *legal rate* or regulation that results in constructive notice on the part of the public: the filing is important merely as the statutory prerequisite to the existence of the legal rate. There would be no uniformity of service if the legal rate or regulation could be deviated from either by accident or design. The test, therefore, which should be applied is not, as we have indicated above, whether a rate or regulation is on file with a regulatory body, but rather whether the rate charged, including the regulation which attaches to and is a part of it, is in fact, the legal rate, and if it is, what service is to be performed and what measure of liability assumed thereunder. As we have pointed out, in the case of carriers of persons and property, a rate is not legal until it is filed, and therefore unless the rate has been filed a carrier cannot in an action at law invoke the doctrine of constructive notice, not because of the physical fact that the carrier has failed to file the rate, but because on account of the failure to file it it has no existence as a legal rate. But filing does not enter into the determination of the question whether a telegraphic rate is or is not the legal rate; the test in the case of a telegram is, was the rate charged *the one initiated by the telegraph company prior to the date of the message, and was it, therefore, the regularly established rate?* If it was, then it is the legal rate, and if it is the legal rate, the doctrine of constructive notice must apply just as forcibly and just as effectively as in the case of carriers of persons and property.

The principal object of filing the defendant's rates and schedules with the Interstate Commerce

Commission was to make it easy for the public to ascertain or for the company to show what the legal rate and regulation was on the particular date and with respect to the particular class of service; it was not because defendant was under any misconception as to the necessity of filing rates or regulations, or as to the effect of such filing on the question of whether a rate or regulation was legal.

In other words, the fact that the Interstate Commerce Commission has not seen fit, under Section 15 of the Commerce Act, to require this petitioner to file its tariffs and regulations is immaterial in view of the fact that the Commission has assumed and exercised the right of regulation and supervision of the tariffs and regulations voluntarily filed by it, and has recognized such tariffs and regulations as the legally established ones. It has expressly recognized those tariffs and regulations as binding upon all until changed; that binding force resting not upon any acceptance of such terms by the shipper when he contracts with the carrier, but upon the reason of public policy which as a matter of law imports knowledge and acceptance of such terms to every shipper, no matter how he deals with the carrier. Such being the case, and those tariffs and regulations having been repeatedly upheld as to the general public, they can not without violation of the provisions against preference and discrimination be invalidated as to a particular class of users of the petitioner's facilities for interstate or foreign commerce.

Further analysis of the Commerce Act.

The question of the defendant filing its tariffs with the Interstate Commerce Commission is also immaterial when considered on a fair analysis of the provisions of the Commerce Act. It is significant that immediately after the enactment of the amendment taking effect August 10, 1910, by which telegraph, telephone and cable companies were made subject to this act to regulate commerce, the Interstate Commerce Commission, after careful hearing of the parties interested, considered the sections of the act which apply to such companies, and in conference ruling 305 in the latter part of the year 1910, or early in the year 1911, announced its conclusion that telegraph, telephone and cable companies must conform to the provisions of Section 1 of the act requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that they may lawfully issue franks covering their interstate service to the same extent as other common carriers under the provisions of that section; also that they were governed by the provisions of Section 3, forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage whatsoever, and that they are subject to the lawful orders of the Commission pursuant to Section 15 of the act, and also to Section 20 thereof.

Let us examine for a moment the effect of these particular sections of the act which the Commission thus concluded applied to and governed actions of telegraph companies.

By section 1, as has been indicated above, they were designated as common carriers under and subject to such provisions of the act as were made specifically applicable to them in the transmission of messages between the States and Territories and from or to foreign countries. By section 1 they were also required, together with all other common carriers named in the act, to make their charges for such transmission just and reasonable, and every unjust and unreasonable charge was prohibited. It was also made the duty of such common carriers to enact just and reasonable regulations and practices respecting the management of their business, and they were also specifically authorized to classify into certain defined classes, messages for transmission and to make different rates for the different classes of messages.

It will be observed that these provisions apply to all classes of transmission companies and necessarily govern all such transmission within the territorial limits of the United States.

By Section 3 of the act it was made unlawful for any common carrier subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By Section 15 there was granted to the Commission, either upon its own initiative or upon complaint, power to investigate and examine, and

whenever "the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property, or for the transmission of messages by telegraph or telephone, as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practices so prescribed."

Section 20 deals with reports and methods of keeping accounts, and throws no light on the questions involved in this case.

A careful reading of the sections of this act will indicate that the duties of common carriers

are defined in sections 1, 2, 3 and 4; 2 and 4 have special reference to transportation carriers and do not apply to telegraph and cable companies; 1 and 3 unquestionably do. The subsequent sections of the act relate to the methods, procedure and instrumentalities which, in the opinion of Congress, were necessary to be employed in order to secure the observance of the obligations set forth and enacted in the four sections to which we have referred. These subsequent sections provide different methods by which different classes of carriers are required to proceed in the transaction of their business in the observance of the duties of uniformity of service and equitable dealings with the public as defined in the first four sections of the act.

Thus, Section 6 requires that, *before* carriers of goods and passengers shall embark in the business of such transportation, their rates, fares and charges shall be filed with the Interstate Commerce Commission and be posted at stations, and such carriers are prohibited from engaging or participating in transportation of passengers or property unless such schedules have been thus filed with the Commission and posted; in addition, there is a prohibition against the charging, demanding or collecting greater or less, or different, compensation than such as is provided in the tariff in effect at the time.

It is obvious in tracing the historic development of the act and the amendments made since the original enactment of the legislation in 1887 that the additional requirements in this Section 6, and other features closely connected therewith found in other sections of the act and applicable

to this particular class of carriers, have been added to the act in order to secure from such carriers the due observance of the provisions of Sections 1, 2 and 3 of the act, which remain substantially as originally enacted.

The mere filing of these schedules by this particular class of carriers as provided in Section 6 has no significance or peculiar value with respect to the rates, except as they secure to persons dealing with the carriers equal facilities for protection against unreasonable and discriminatory charges, such as were forbidden by law to the carriers before these special requirements were fixed by Congress. Carriers before such amendatory legislation were under the same substantive obligations with regard to equality of service, rates and facilities as since these schedules have been required to be filed. The fact that such requirements are now exacted of this particular class of carriers is evidence not that any new duties arise because of the filing of these schedules, but that Congress has concluded in its wisdom that by that method alone can the performance of the obligations of Sections 2 and 3 be best secured. There has been no change of obligation. The obligations of the carrier have remained the same at all times, but the method of insuring their performance has, as we have seen, by the amendments to the act, and particularly Section 6, been made much more rigid with respect to this class of carriers. It is also to be noted that while such has been the case with transporters of freight and passengers, the obligation existing under section 3 of the act and under section 1, with respect to

telegraph and cable companies, is precisely the same as that of carriers of freight and passengers. The regulations of both classes of carriers must be reasonable; their charges for service rendered must also be reasonable. Unreasonable charges are equally prohibited to both. The quality of service exacted from both is identical, but in the case of telegraph companies Congress has concluded that it is **permissible for the the carrier to put rates into effect without their previous filing with the Commission and without their publication at stations,** as is also the case with respect to its regulations and classifications of messages and the rates therefor.

The procedure thus differs, but the obligations of the carriers to the public are the same, and the obligations of the public to the carriers are likewise the same, and defined in the same language in sections 1 and 3 of the act.

The establishment of the message classification made it the legal classification, without reference to the fact of filing with the Commission.

When the telegraph company, therefore, by its board of directors, duly enacted the regulations, as the agreed statement of facts shows it did, and fixed the rates for the different classes of messages, the rules binding the public were such rules thus enacted until changed by such company or by order of the Commission; and it made no difference whether they were known to the public or not; each class of messages took the rate attaching to that class of messages and the measure of liability as fixed by the regulations for that class. Such

is the effect of the decisions of this court in all the cases which have been before it respecting carriers of freight and passengers, and the fundamental principle which underlies these decisions under section 3, which requires uniformity, applies as completely in the case of transmission of messages as in the case of transportation of persons or property.

In *Stephens v. Ohio State Telephone Company*, 240 Fed. 759, the court said, at page 767:

> "(4) In 1910 (Act June 18, 1910, sec. 7) the Interstate Commerce Act of 1887, and subsequently amended, was further amended to the effect that:
>
> "'The provisions of this act shall apply to * * * telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act.'
>
> "It seems to be clear that the purpose of Congress in this enactment was to classify such corporations as the defendant here, for all purposes so far as the administration of the laws of the United States is concerned, with railroads and other transportation common carriers, for the laws pertaining to interstate commerce, while generally providing for matters of administration of the duties of instrumentalities of interstate commerce towards the public, yet comprehensively bring them within the jurisdiction of the federal courts for all purposes relating especially to their duties as interstate agencies. We cite this act, therefore, to the point that all decisions touching the jurisdiction

of the federal courts under the laws relating to interstate commerce are applicable to situations arising with reference to telephone and telegraph companies, and that we may assimilate controversies respecting interstate traffic by telephone and telegraph with those which deal with transportation of goods and persons."

In other words, the rates and the regulations which were fixed by the telegraph company constitute the only methods by which it deals or is permitted by law to deal with the public until they are lawfully changed. There can be no special transaction outside of those rules and regulations as to either class of carriers.

It is inconceivable that a customer of a telegraph company may, by delivering his message to the telegraph company on a blank piece of paper, and claiming that he had no knowledge of the regulations, acquire protection against error up to thirty-two thousand dollars, while his neighbor and competitor sending a similar message and paying the same rate is limited to four dollars because he has written his message on a blank.

The decision of the supreme court of Kansas in the case of *Shawnee Milling Co. vs. Postal Telegraph Cable Company*, 101 Kas. 307, 166 Pac. 493, is squarely in point, as shown by the (Pacific Reporter) syllabus, which reads:

"Where a telegraphic message is dictated over a telephone and is thus received by a telegraph company for transmission, it will not be presumed that any preferential or discriminatory service in violation of law is intended, and the message will be considered as if it were written on the ordinary

blank forms furnished by the telegraph company, and the company's liability for an error in transmission is neither greater nor less nor different than if the message were delivered in the usual and more formal mode of sending telegrams."

The plaintiff had judgment in that case because the message was intrastate, and it was held that the Federal law did not apply, and certain limitations contained in the defendant's standard message blanks were, under the local law, invalid. It also appeared that the defendant had not filed its schedule of rates and charges with the public utilities commission, as required by law. But the Kansas statute affirmatively required the defendant's rates to be filed, while the Interstate Commerce Act does not.

The court in that case said:

"It will thus be seen that the telegraph company has two principal schedules of rates, one for unrepeated messages in which its liability for errors in transmission was limited to the amount received by it for sending the message, and a rate fifty per cent. higher for repeated messages, in which its liability for erroneous transmission was stipulated in advance to be fifty times the sum paid for the service. These rates must be filed with the Public Utilities Commission and may not be departed from by the telegraph company without the assent of that tribunal; and all discrimination and preferences in rates or service is forbidden by the Public Utilities Act. (Gen. Stat., 1915, ch. 97; Laws of 1911, ch. 238, secs. 3, 10, 11, 12, 20, 30.) The service performed by the defendant must be held to have been in pursuance of its regular corporate business, and it should be assumed that no discriminatory or preferential service was be-

ing extended to plaintiff when the defendant received plaintiff's message by telephone for transmission to Wichita. It must be considered as if the plaintiff had formally written the message in the usual way on regular blanks furnished by the company. That telegraph companies frequently accept messages by dictation over a telephone is well known. It would be harsh to say that any illegal preference forbidden by Section 8401 of the General Statutes of 1915 is intended in so doing. Nor would it be just to hold that in extending this apparently harmless courtesy the telegraph company thereby places itself in a less favorable position or assumes a greater responsibility than it does when it receives for transmission telegrams written in the usual way with the usual conditions attached. Nevertheless, if this practice is to be regarded as a general one, carrying a different rate or subjecting the telegraph company to a different degree of responsibility, a uniform schedule of rates and charges for such service and the regulations pertinent thereto should be filed with the Public Utilities Commission and subject to its approval; and such rates and service are invalid until they are so filed, and when formally promulgated, they may not be departed from with impunity. (Gen. Stat., 1915, sec. 8398, 8400, 8416; *State ex rel. vs. Postal Telegraph Co.*, 96 Kan. 298; 150 Pac. 544; *Mollohan vs. Railway Co.*, 97 Kan. 51, 154 Pac. 248.)

"The court is of opinion that in the absence of a distinct schedule of rates applying to telegrams delivered for transmission by telephone, the case is governed by the conditions attached to the usual and more formal mode of transacting its corporate business."

POINT II.

The commerce act applies to incoming cablegrams: certainly to their transmission and delivery within the United States.

The only other question which was raised in this case—namely, whether the stipulations limiting liability which are a part of the rates for interstate telegrams and foreign cables apply to incoming cable messages (so far as their transmission within the United States is concerned), while never seriously in question, has, we think, just been expressly answered by this court. It was necessarily involved in the decision in *Galveston, Houston & San Antonio R. R. Co. v. Woodbury, et al.*,—U. S.—, 41 Sup. Ct. Rep. 114, where the court said:

> "But counsel for Mrs. WOODBURY insists that solely because her journey originated in Canada, the provisions of the Act to Regulate Commerce do not apply. The contention is that Section 1 of the act of 1887 does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger, but of property. (*Boston & Maine R. R. Co. v. Hooker, supra.*) The second is that **the Act does apply to the transportation of both passengers and property from an adjacent foreign country**, such as Canada. Section 1 declares that the Act applies to 'any common carrier * * * en-

> gaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country.' A carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. **The test of the application of the Act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation.** This is the construction placed upon the Act by the Interstate Commerce Commission."

The provisions applicable to telegraph, telephone and cable companies (at the time this message was sent)* applied to such companies engaged in "sending messages from one State, Territory or District of the United States, to any other State, Territory or District of the United States, or any foreign country."

It is true that rights and obligations of the parties under a contract of carriage to be performed in several different states or countries will ordinarily be determined by the *lex loci contractus* (*Liverpool*, etc. *Steam Co. v. Phoenix Insurance Co.*, 129 U. S. 397); but this general principle is subject to the exception that the

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* The present language of the act is [41 Stats. 456, chap. 91, sec. 400, (1) (c)]: "the transmission of intelligence by wire or wireless from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other other place in the United States, *or from or to any place in the United States to or from a foreign country, but only in so far as such* transportation or *transmission takes place within the United States.*"

contract will not be interpreted or enforced in accordance with the foreign law when to do so would be to violate the public policy of the forum; and this is particularly true where, as in this case, the wrong complained of occurred in the jurisdiction in which the suit is brought. (*Corpus Juris*, title *"Contracts,"* vol. 13, p. 257.)

In the *Kensington* case, 183 U. S. 263, this court refused to recognize a provision of a contract of carriage exempting the carrier from liability for negligence, though such provision was valid under the law of the place where the contract was made.

The court said (p. 269):

> "As, however, the ticket was finally countersigned in Belgium, and one of the conditions printed on its face provides that 'all questions arising hereunder are to be settled according to the Belgium law, with reference to which this contract is made,' it is insisted that such law should be applied, as proof was offered showing that the law of Belgium authorized the conditions. The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine

that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. (Story, Conflict of Laws, sections 38, 244.) Whilst as said in *Knott vs. Botany Mills*, the previous decisions of this court have not called for the application of the rule of public policy to the precise question here arising, nevertheless, that it must be here enforced is substantially determined by the previous adjudications of this court. In *Liverpool & Great Western Steam Co. vs. Phoenix Ins. Co.*, 129 U. S. 397, the question arose, whether conditions, exempting a carrier from responsibility for loss caused by the neglect of himself, or his servants, could be enforced in the courts of the United States, the bill of lading having issued in New York by a British ship for goods consigned to England. Despite the fact that conditions, exempting from responsibility for loss, arising from negligence, were valid, by the laws of New York, and would have been upheld in the courts of that state, it was decided that, in view of the rule of public policy applied by the courts of the United States, effect would not be given to the conditions. In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made in one of the states of the Union. Nor is the suggestion that, because there is no statute expressly prohibiting such contracts, and because it is assumed no offence against morality is committed in making them, therefore they should be enforced, despite the settled rule of public policy to

the contrary. The existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion."

It is evident we believe that an agreement made in a foreign country by the petitioner to send cablegrams from foreign points to the United States at less than its tariff rates would be invalid and unenforceable in this country. Likewise an agreement made in a foreign country by petitioner to repeat all telegrams in the United States in spite of the fact that only the unrepeated message rate was charged would be illegal and unenforceable in our courts. Yet this would be merely doing directly what the respondents seek to do by indirection, namely, to pay the lower rate provided for an unrepeated message, and to escape the limitation of recovery to the price paid for sending the message, which is the basic factor in fixing that rate, solely and admittedly because the message was not delivered originally to the petitioner on one of its blank forms in which the limitations of liability attaching to the various classes of service are set forth.

We contend that public policy requires that the tariff provision be enforced whether the contract is made in this country or in a foreign country. It seems to us that to promulgate a contrary rule would make evasion of the Interstate Commerce Act simple and would result in discrimination in rates in favor of foreigners as against our own citizens. It is inconceivable that such a result should be permitted by the courts of this country, particularly when, as here, the breach of duty occurred and the cause of action accrued within the territorial limits of the United States and there was a separate rate

fixed (see R., p. 19) for the performance of that part of the contract which was to be executed in this country.

The error which is the basis of this cause of action occurred in the course of transmitting the message between New York and New Orleans; the rate paid by the plaintiff was a combination rate, one component part of which was the rate from New York to New Orleans. Respondents were not entitled to any greater service nor should the petitioner be subjected to any greater liability in the transmission of this message from New York to New Orleans than if it had been an ordinary unrepeated message originating in New York. That in such a case the *Hooker* and similar cases control and require the enforcement of the tariff limitation of liability has already, we hope, been clearly demonstrated.

In *Commercial Cable vs. Western Union Telegraph Co.*, 45 I. C. C. 33, the Commission said (p. 38):

> "The defendant contends that the rates on messages from points in foreign countries to points in the United States are through rates; that this Commission has no jurisdiction over such through rates; that the defendant has no 'rates' on deferred messages from New York to points in the United States, the earnings received by the defendant on such messages being simply portions of the through charges accruing as divisions to the defendant for its part of the through services.
>
> "Apparently the rates on messages from points in foreign countries to points in the United States are not 'joint through rates'

such as those published by a railroad which holds the concurrences of its connections. The through rates, however, are made by adding together the rates or half rates of the several telegraph and cable companies which participate in the transmission, and thus the complete charge for the through service can readily be ascertained and quoted to the sender at point of origin. As previously stated, the through charge on a deferred message from an interior point in France to an interior point in this country would consist of three component parts, the French government reciving one-half its local rate to Havre, the cable company receiving half its regular cable rate, and the land line in the United States receiving half its rate on regular cable messages. It is clear, therefore, that **the through rate is a 'combination' rate, one component part of which is the charge made by the land line for transmitting the message from New York to destination.**

"It may be observed that the transmission of a through message is not a continuous service. The message must be transferred from a land line to a cable line on the European shore, and again transferred from a cable line to a land line at New York; and the defendant concedes that **'so far as defendant is concerned,' the messages may be regarded as originating in New York. Looking at the matter from this point of view it is clear that we have authority under the act to require the defendant, in imposing charges for its service within this country, to avoid unjust discrimination,** not only as between persons, but as between carriers."

POINT III.

Mistakes of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals will be found in the transcript of the record at page 37. The first error in the court's opinion is the statement (R. p. 40) that at the time of the handling of the message the Interstate Commerce Commission, so far as telegraph, telephone and cable companies are concerned, had not exercised any of the powers conferred on it by Sections 15 and 20 of the Interstate Commerce Act. Four months prior to the handling of the message, as pointed out earlier in this brief, the Interstate Commerce Commission had exercised some of these very powers. (*Clay County Produce Company v. W. U. Tel. Co.*, 44 I. C. C. 670.)

The court of appeals also states (R. p. 41) that the act to regulate commerce does not provide a limitation of liability not contracted for by the parties, and concludes that in the absence of a statutory or contractual modification of such liability the parties to the message are entitled to recover all the damage that results proximately from the breach of duty. This construction of Section 1 of the Act would, as to telegraph companies, make the Act meaningless. The Act of 1910 was designed to protect the public. It meant nothing if it did not mean that thereafter in determining the effect of all contracts between the public and the carriers subject to the Act, which include telegraph, telephone and cable companies, the Act must be deemed to be a part of the contract; and not only did it prohibit the making of any contract in conflict with the Act, but any *special* and particular contract at all.

In *Pennsylvania Railroad Co. v. International Coal Company*, 230 U. S. 184, this court said:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, §2; March 2, 1889, 25 Stat. 855, c. 382, §6 *Armour Co. v. United States*, 209 U. S. 56, 83.) **The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike.**"

We believe that the telegraph company's classification of messages and the regulations affecting each class, which were duly adopted by its Board of Directors pursuant to the Act, as shown by the stipulation of facts, (R. p. 17) and which regulations and classifications were on complaint of a user of the telegraph, after full hearing, approved as reasonable by the Interstate Commerce Commission, (*Clay County Produce Co. v. Western Union Telegraph Co., supra*), likewise have the force of a statute, binding on the telegraph company and customer alike.

The court of appeals also said (R. p. 41) that the Act was not intended to enable a carrier to escape liability for a breach of its undertaking to render a service by showing that the party for whom the service was rendered was charged less than the reasonable value or less than the amount exacted from others for similar services; and later (R. p. 42) that the fact that there was an unlawful discrimination in favor of the sender of the telegraph message would not enable the carrier of such message to escape liability where the discrimination in favor of the sender was without his knowledge or consent.

But the fallacy of this is evident. The court proceeded on the theory that the sender of this message desired repetition and was willing to pay the appropriate rate therefor, but that without any fault on his part he was kept in ignorance of the choice, which in fact was his, between the unrepeated rate with a limited liability and the repeated rate, involving double transmission service and a greater measure of liability. There is however no warrant for this assumption in the record. All telegraph administrations, including the French and the Spanish Government lines* as well as the petitioner, provide by their regulations for the repetition of messages at an additional cost; and although in the nature of things repetition is the only absolute safeguard against error, it affirmatively appears in this case (R. page 19) that the sender did not ask for repetition. If the message had been repeated, therefore, he could not have been compelled to pay for the extra service and the greater liability; if the court determines that he secured for the minimum rate, not only the liability appropriate to the repeated message rate but

* The International Telegraph Convention of St. Petersburg (Lisbon Revision, 1908), to which the French and Spanish government telegraph administrations are parties, contains the following:

"Collated Telegrams.

"LI.

"1. The sender of a telegram has the right to request that it be collated. In this case he writes before the address the instruction 'Collation' or 'TC.'

* * * * * * * * *

"3. The collation, which consists of the entire repetition of the telegram (including the preamble), is given on all instruments by the receiving office immediately after the transmission of the telegram, or of the series containing the telegram to be collated.

* * * * * * * * *

"4. The charge for collation is a quarter of the charge for an ordinary telegram of the same length between the same points."

actually a liability without limit, the court is commanding the telegraph company to do the very thing which is forbidden by the act: that is, to discriminate in favor of Esteve Brothers and against the sender of a similar message who wishes the double service and selects and pays the higher rate.

The Circuit Court of Appeals says:

> "No provision of the Act purports to put it in the power of a carrier of messages by telegraph or cable to bind senders thereof by conditions not brought to the notice of the latter." (R. p. 43.)

This statement can be answered best, perhaps, by saying that no provision of the Act purports to give the other carriers subject to the Act similar power, yet this court has repeatedly held that the public is bound by the duly established rates and tariffs of the carriers of persons and property; and certainly there is nothing in the Act which evinces an intention by Congress to place telegraph, telephone and cable companies in any different position in this respect from the other carriers.

Conclusion.

In conclusion we think it not amiss to repeat and emphasize the following from our petition for certiorari:

"While formerly the practice of telegraph companies in requiring that messages, before acceptance, be written on the usual blanks was very strictly enforced, it has in late years been greatly relaxed, because of the conviction that since the act of 1910 the limitations of liability were available regardless of the form in which the message came to the telegraph company's office.

This relaxation of the former strict rule has been of great practical convenience both to the companies and their patrons. Not only has it made it possible to accept large numbers of messages by telephone, but it has prevented the slight delays and annoyances which were incident to the old practice of compelling the sender, who had prepared his message on plain paper, to copy it or paste it on a sending blank."

We respectfully submit that it is immaterial in law whether a message when delivered to a telegraph company is written on a printed blank containing the usual limitations of liability, and that the sole test is what class of service was chosen: if the unrepeated message was chosen and the rate paid was the unrepeated message rate, then the stipulation limiting the liability in respect of such a message to the amount received by the telegraph company for handling it, which stipulation is a necessary part of the rate itself, immediately attaches to the message and limits the recovery. The liability of the petitioner here should be restricted to the sum of four dollars and sixty-five cents, with interest.

The judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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